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IN THE

Supreme Court of the United States

OCT. TERM, 1957

No. ~~1077~~ 182

LIEBERMAN-KOREN CORP., and SYLVIA KAPNER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LIEBERMAN-KOREN CORP.,
and SYLVIA KAPNER
Petitioners PRO SE
c/o Selig Kaplan
16 Court Street
Brooklyn 1, N. Y.

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To the Honorable Supreme Court of the United States:

Petitioners, Lieberman-Koren Corp. and Sylvia Kapner, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision of said Court rendered the 18th day of April, 1957.

Jurisdiction

This Court has jurisdiction to review said decision under 28 U. S. Code 1254(1).

Judgment

The judgment herein was rendered in the United States District Court for the Eastern District of New York on November 17, 1955, finding the defendants guilty of violation of Title 29, U. S. C., Sections 207, 215(a)(2); 215(a)(5) and 216(a); and of 215(a)(1) and 216(a). The District Judge sentenced the defendants to pay a fine to wit: $1,000.00 on each of three counts for the corporation and $250.00 on each of three counts for the individual petitioner, or an aggregate of $3,000.00 for the former and $750.00 for the latter.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment on appeal with the following per curiam opinion:

> "There was adequate evidence, presented by the employees themselves, that they had worked overtime for the defendant corporation—of which the individual defendant was the sole office employee and bookkeeper—and that they had not been paid the overtime wages required by law. Testimony from them was obviously necessary and appropriate, since the defendants controlled the corporate books. Denial of the defendants' motion for a bill of particulars was quite proper, particularly in view of the extensive details supplied defendants by the United States Attorney. There was no error in the admission of testimony, including a defense witness' prior statement, with a portion shown to have been deleted, as it had been because of defense objections. The trial conduct of the prosecuting attorney was unexceptionable and the judge's charge fair and adequate. The appeal is quite without merit."

A petition for rehearing was denied on May 13, 1955.

The Statute Involved

The prosecution herein arose under alleged violations of the provisions of Title 29, U. S. C. Sections 207, 215(a)(2) and 216(a), in that the petitioners allegedly employed persons in interstate commerce for work weeks longer than 40 hours without paying one and one-half times the regular rate of pay for hours worked in excess of 40 hours; Sections 215(a)(5) and 216(a) for allegedly keeping false records and Sections 215(a)(1) and 216(a) for making shipments in interstate commerce in violation of the statute. The statute is known as the Fair Labor Standards Act.

The Facts

The information covered a period from March 1, 1951 to December 5, 1952. It was claimed that employees of the corporation worked hours in excess of 40 hours during work weeks without being paid time and one-half for the excess hours so worked. The violation of the record keeping provisions of the statute arose because it was claimed that the corporate records did not show overtime worked during the period mentioned. The third count followed by reason of the claimed violation of the first two counts.

The record is barren of any proof that any of the employees of the corporation worked more than forty hours in any work week without being compensated as required by law. The violation of the second count was inferred from the findings as to the first count, since it must have been reasoned that if the men in fact worked more than 40 hours in any week without being paid for overtime and the records failed to reflect such work, then the records were false.

There was no proof that any of the witnesses worked more than 40 hours in any work week, nor that any of the records kept were false.

The decision of the Circuit Court that the records were in charge of the corporation obviously shows the inference reached by that Court that ipso facto such records were false. This reasoning unlawfully shifted the burden of proof to the defendants, contrary to law. There was no burden on the defendants to show that the records were correct.

There was serious error committed by the trial court in charging the jury as follows:

> "The offense charged is a course of conduct. The Government need not prove specific dates or hours worked by employees."

This charge was based upon the decision of the Supreme Court of the United States in the case of *U. S.* v. *Universal C. I. T. Corp.*, 344 U. S. 218, where a question of pleading was decided. The language used there at page 224, is:

> "The offense made punishable under the Fair Labor Standards Act is a course of conduct."

It was never intended by that language to set up a standard of proof.

The Questions

Petitioners believe that the courts below have decided an important question of Federal Law which has not been but should be decided by this Court. I.e., is it sufficient, under the *Universal C. I. T.* case (*supra*) to offer general statements showing an alleged course of conduct without any proof of hours worked during specific weeks?

Petitioners also believe that the Trial Court below has so far departed from the accepted and usual course of judicial proceedings by permitting the case to go to the jury without any proof as to be shocking; and the Circuit Court has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. This latter action is evidenced by the cursory dismissal of the questions raised on appeal in the Circuit Court.

Reasons for Granting This Writ

The effect of the affirmance by the Circuit Court of the judgment of conviction is to leave open to prosecution and conviction every employer in the United States, and particularly in the Second Circuit, upon no evidence as to violations of the Fair Labor Standards Act. If the law established by this case is permitted to stand, there will be no need for the government to prove that any person worked more than 40 hours in any work week and was not paid overtime rates. All that will be necessary is a willingness by witnesses, whether learned, ignorant or illiterate, to testify that they worked more than 40 hours, at some time or other, without being able to state when, and on

such testimony a court will send a case to a jury and permit a conviction to stand.

Every employer is in jeopardy so long as such a rule of law is permitted to exist.

While a "course of conduct" may constitute a crime nevertheless the proof of that crime must depend upon common law proof of its commission. The record of the trial of this case fails to show any proof of the commission of any crime.

The granting of the writ prayed for here will open the record for review by this Court and present an opportunity to settle the questions of law as to whether it is sufficient to show only a course of conduct in order to prove a violation of the Fair Labor Standards Act.

WHEREFORE your petitioners pray that a writ of certiorari may be issued by this Court.

Sylvia Kapner

LIEBERMAN-KOREN CORP.
SYLVIA KAPNER
Petitioners

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

SYLVIA KAPNER being duly sworn, deposes and says that she is one of the petitioners herein; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Sylvia Kapner

Sworn to before me this
10 day of June, 1957.

Notary Public, State of New York
No. 41-2033700
Qualified in Queens County
Commission Expires March 30, 1959